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No. 03-319

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNION CARBIDE CORPORATION,

Petitioner,

v.

THE HONORABLE ARTHUR M. RECHT, THE HONORABLE BOOKER T. STEPHENS AND THE HONORABLE ALAN D. MOATS; ALL PLAINTIFFS IN IN RE: WEST VIRGINIA ASBESTOS PERSONAL INJURY LITIGATION (CIVIL ACTION NO: 02-C-9004 AND 02-C-9005),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iii
Reply to Respondents' Reasons for Denying the Petition	2
I. This Court Has Jurisdiction.	2
II. Question One Deals With Procedural Due Process Requirements For Punitive Damages Not Substantive Due Process.	4
III. Question Two Deals With The Federalism Limitations On Punitive Damages Awards To Avoid Double Counting, Not Choice Of Law.	5
IV. The Mass Trial Lacked Commonality And Resulted In Prejudice.	6
V. UCC'S Choice Of Law Issue Advanced Below Implicates Substantial Constitutional Issues.	8
VI. The "Collateral Estoppel" Ruling Raises Constitutional Issues.	10
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 6

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931) 2

Bd. of Educ. v. Superior Court, 448 U.S. 1343 (1980) 3

Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) 10

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) 5

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 3

Fisher v. District Court, 424 U.S. 382 (1976) 2

Hudson Distribs., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964) 3

Madruga v. Superior Court, 346 U.S. 556 (1954) ... 2, 3

McKinney v. Fairchild Int'l, Inc., 199 W. Va. 718, 487 S.E.2d 913 (1997) 5

Cited Authorities

Page

Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 10

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 8, 9

State ex rel. Mobil Corp. v. Gaughan, 211 W. Va. 106, 563 S.E.2d 419 (2002), *cert. denied*, 123 S. Ct. 346 (2002) 7

State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513 (2003) 4, 5, 6

Statute:

28 U.S.C. § 1257 ..... 2, 3

Rule:

Trial Court Rule 26.01 ..... 1, 7

Cited Authorities

Page

Other Authorities:

Justice Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945) 9

Douglas Laycock, *Equal Citizens and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992) 9

Arthur R. Miller and David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1 (1986) 9-10

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002) 2

Petitioner seeks a writ of certiorari because permitting the unconstitutional "mass trial" to stand will eviscerate defendants' due process rights and the requirements of federalism by allowing a single state to devise a set of infirm constitutional procedures in complete disregard of those rights and requirements simply because of the exigencies created by asbestos litigation.

The degree of constitutional harm is illustrated by the Respondents' Brief in Opposition ("Opp.") which views the "mass trial," with its clear disregard for Supreme Court precedent that imposes the constitutional limits of due process and federalism on punitive damages, aggregation, choice of law and collateral estoppel, as "business as usual" in West Virginia.[1]

The decision below is out of step with constitutional requirements, this Court's precedents, and the decisions of a plethora of Federal and State courts that have correctly assessed these constitutional limits. Petitioner, Union Carbide Corporation ("UCC"), asks this Court not only to correct clear legal errors, but to address the constitutional issues raised in this petition and which pervade the rulings of which UCC seeks this Court's review.

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1. Respondents state that "West Virginia Trial Court Rule 26.01 . . . directly reflects the 'specialized approach' to asbestos personal injury litigation that the West Virginia courts have developed 'over the past twenty years,' and that they have successfully applied to resolve 'tens of thousands of asbestos-related claims.' " Opp. at 3. This statement of pragmatic success misses the point of this petition. The "end" can never justify unconstitutional "means." Further, Respondents neglect to state that those resolutions were all settlements. Although four common-issues mass trials were conducted in Kanawha County and two in Monongalia County none of them resulted in a determination of causation and damages in the second phase because they all settled. There has never been appellate review of a West Virginia mass trial.

REPLY TO RESPONDENTS' REASONS FOR DENYING THE PETITION

I. This Court Has Jurisdiction.

Petitioner's request for a writ of prohibition and/or mandamus was a separate proceeding before the West Virginia Supreme Court. The state court's decision to deny the writ is "final" as to that proceeding and hence reviewable under 28 U.S.C. § 1257. This straightforward jurisdictional rule is well established and uncontroversial. As the leading treatise explains:

> Applications for [writs of prohibition, mandamus, and *quo warranto*] are often filed in state courts as independent cases, even though they relate to a pending lawsuit. Such proceedings may be carried forward to conclusion before the primary litigation has come to an end. To be final for purposes of § 1257(a), the state court judgment must conclusively determine the *right of the applicant to the writ sought.*

Robert L. Stern, *et al.*, *Supreme Court Practice* 159 (8th ed. 2002) (emphasis added).

Respondents argue that this Court may only have jurisdiction over an extraordinary writ when there is a jurisdictional claim and its resolution could end the litigation. Opp. at 13 and 14. But *Fisher v. District Court*, 424 U.S. 382 (1976); *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931) and *Madruga v. Superior Court*, 346 U.S. 556 (1954) invoke no such requirement for finality. Instead they clearly rest on the principle described above: that writ actions

are separate proceedings, so that decisions denying writs are final for purposes of § 1257. *See Madruga* 346 U.S. at 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257"), *see also Bd. of Educ. v. Superior Court*, 448 U.S. 1343, 1346 (1980) ("petition for a writ of mandamus and/or prohibition was a distinct lawsuit which was fully and finally determined by the [state] Supreme Court's judgment"); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964) ("The fact that separate and unresolved issues are pending in the Ohio courts and subject to 'further proceedings' therein . . . does not render the judgment of the Ohio Supreme Court [denying writ] nonfinal . . .").

Absent this Court's review, phase II trials will be conducted for years, all pursuant to West Virginia's unconstitutional mass trial procedure. The Court should reach the issues raised by UCC now to bring the mass trial proceeding, and the attendant violations of UCC's due process rights and federalism principles, to an end.

Even under a narrower standard of jurisdiction over an extraordinary writ, this Court has jurisdiction under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Respondents do not challenge the availability of *Cox* except to question what "federal policy" is at stake. Opp. at 14-15. The federal policy at issue here is the violation of due process resulting from West Virginia's "specialized," but unconstitutional, approach to trial management for asbestos litigation and the West Virginia judiciary's encroachment upon the sovereignty of other states through its studied indifference to this Court's federalism precedents regarding choice of law and punitive damages. *See* Petition for a Writ of Certiorari ("Pet.") at 9.

II. Question One Deals With Procedural Due Process Requirements For Punitive Damages Not Substantive Due Process.

Question One deals with procedural due process. In opposition to Question 1 Respondents contend that a punitive damages multiplier of three times compensatory damages does not violate this Court's holdings on substantive due process in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003) and its predecessors. Opp. at 15-17. The Respondents' substantive due process arguments miss the point – they are irrelevant to the issue of procedural due process.

The Respondents argue that the multiplier will be tailored to each plaintiff's claim as the multiplier is applied to each plaintiff's compensatory damages. Opp. at 18-19. This ignores the fact that the multiplier is, by definition, a constant. While a plaintiff's compensatory damages may vary in accordance with the loss that the plaintiff has suffered the multiplier remains the same regardless of the relationship, if any, between UCC's conduct and each individual plaintiff. The disconnect between UCC's conduct vis-à-vis the individual plaintiff and the constant punitive damages multiplier renders the award of such damages arbitrary and, therefore, in violation of due process.

III. Question Two Deals With The Federalism Limitations On Punitive Damages Awards To Avoid Double Counting, Not Choice Of Law.

Question Two deals with the federalism limitations on punitive damages awards and asks whether West Virginia can punish UCC for the conditions which allegedly were experienced by all non-employee workers in the Ohio facility, although many of those non-employee workers were not parties to the "mass trial." If a West Virginia court is going to adjudicate punitive damages for all workers at an Ohio plant then *Campbell* imposes two requirements: (1) that all workers be included in the case; and (2) that Ohio law must be applied.[2] *Campbell*, 123 S. Ct. at 1522. The Respondents address only the second requirement, and simply ignore that the first requirement is not satisfied, as UCC argues in its Petition.

If it is assumed that the conduct of UCC at its Marietta, Ohio plant is relevant to a determination of reprehensibility, then the jury must be told that it cannot punish UCC for conduct at that plant in relation to workers who are not part of the mass trial. *Campbell*, 123 S. Ct. at 1522-23. The reasoning for this is straightforward:

> Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains.

Id. citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring) ("Larger damages might also 'double

2. West Virginia recognizes the doctrine of *lex loci delicti* so that "the substantive rights between the parties are determined by the law of the place of the injury." *McKinney v. Fairchild Int'l, Inc.*, 199 W. Va. 718, 727, 729, 487 S.E.2d 913, 922, 924 (1997).

count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover").

The jury in the "mass trial" received no such caution. *See* App. I to Pet. at 66a. Instead Special Interrogatory No. 4 asked the jury to determine UCC's liability for punitive damages due to UCC's actions directed towards "non-employee workers . . . present on the sites owned by Union Carbide." *See* App. J to Pet. at 94a. The jury was not instructed to confine its inquiry to workers at the sites in issue who were plaintiffs at the trial.

UCC is now subject to the possibility of multiple punitive damages awards for the same conduct should workers from the Ohio plant, who are not parties to the "mass trial" commence one or more separate suits. The conduct of the "mass trial" thereby violates the federalism limitations on the awarding of punitive damages articulated in *Campbell*.

IV. The Mass Trial Lacked Commonality And Resulted In Prejudice.

Respondents' main argument is that UCC was the only defendant in the "mass trial" after all other defendants settled or were dismissed. Opp. at 1, 9, 22, 24. This ignores the fact that 4500 plaintiffs who "were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods" were part of the trial. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997); App. O to Pet. at 113a. It also ignores that premises liability claims arising from six premises, each with numerous

worksites,[3] were improperly combined in one trial with factually and legally distinct products liability actions. UCC's right to a meaningful opportunity to be heard was lost because the claims that were presented were put forth in the most general manner, and in most instances the details of the individual claim were not presented at all. *See* Pet. at 14 and 25-26.

Respondents then argue that the court below conducted a commonality inquiry when the initial referral of all West Virginia asbestos cases to the mass litigation panel ("MLP") under Rule 26.01 took place. Opp. at 23-24. Even if true, this is irrelevant. The current petition challenges the conduct of an actual trial that has been completed. In contrast, the inquiry referred to by Respondents took place at a time where no specific trial structure existed and years before the completion of the trial that is the subject of this petition. *See State ex rel. Mobil Corp. v. Gaughan*, 211 W. Va. 106, 112, 563 S.E.2d 419, 425 (2002), *cert. denied*, 123 S. Ct. 346 (2002).[4]

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3. To provide but one example, the South Charleston plant is 230 acres, has been in operation since 1925 with the buildings and chemical operations varying over time, and the number of employees has ranged from a high of about 6000 to a low of about 2000. The "mass trial" sought to determine if UCC premises were "unreasonably dangerous" in aggregate despite the variety of operations occurring at a plant such as the South Charleston plant over a 50 year period. *See also* App. G to Pet. at 51a.

4. For example, the products and premises cases were originally to be tried separately under the Trial Scheduling Order entered on February 26, 2002 ("TSO") (*See* App. E to Pet. at 31a) but on the eve of trial the products and premises cases were collapsed into one trial. *See* App. H to Pet. at 56a-57a. Indeed the TSO was not in existence in 2000 when the initial referral took place. *See* Opp. at 23.

The "mass trial" as conducted, not just as planned, lacked commonality and resulted in prejudice contrary to the requirements for an aggregation to pass muster under the Due Process Clause by ensuring an opportunity to be heard at a meaningful time and in a meaningful manner. *See* Pet. at 19-22.

V. UCC'S Choice Of Law Issue Advanced Below Implicates Substantial Constitutional Issues.

Respondents claim that UCC did not raise the issue of choice of law before the trial court. Opp. at 26-27. Respondents are wrong. The MLP at a hearing on August 12, 2002 heard argument as to the due process and federalism requirements attendant upon a choice-of-law analysis. *See* App. G to Pet. at 50a and 52a-53a. The MLP ruled that West Virginia law would apply to all aspects of the Phase I Trial:

> We understand the argument made regarding choice of law. We understand that there may be plaintiffs that absolutely have no nexus whatsoever. I don't know. But we do know that in order to get some order out of this asbestos chaos we are going to apply West Virginia law in all aspects of the first phase of this trial. And to the extent that anybody is aggrieved by that, your objection is noted and preserved.

See App. G to Pet. at 53a.

The MLP failed to conduct the requisite "significant contacts" analysis required by *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Opp. at 26-27. Indeed, the MLP

stated that it understood the arguments as to the necessity of such analysis, but nonetheless determined that it would adopt West Virginia law regardless of any conflict. *See* App. G to Pet. at 53a.

Respondents misunderstand *Shutts*' "materiality" requirement and seek to hide behind the massive scale of the aggregation to impose a requirement upon UCC to show that a significant percentage of the claims in the "mass trial" lacked a connection to West Virginia. *Shutts*' does not contain such a requirement. Instead *Shutts* recognizes that it is impermissible to apply the law of the forum state to a claim if that law is different in a material way from the law of the state with the most significant contacts with the claim. *Shutts*, 472 U.S. at 816. The principle articulated in *Shutts* would be violated if UCC was presented with only one claim as to which an incorrect and materially different law was applied. However, in the "mass trial" there were numerous claims from numerous states each with its own laws. For example all of the claims arising out of the Ohio facility should have had Ohio law applied, and in the case of punitive damages the difference in legal standards was clearly material. *See* Pet. 25 n.31.

The Respondents seek to mischaracterize Question Three as a state law question dealing with the trial court's misapplication of West Virginia's choice of law jurisprudence. Opp. at 27. However, choice of law in the United States is inherently constitutional law. Douglas Laycock, *Equal Citizens and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 250 (1992) (citing Justice Robert H. Jackson, *Full Faith and Credit – The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 2, 6-7 (1945)). Choice of law is the principal protection of interstate federalism. *See* Arthur R. Miller and David Crump, *Jurisdiction and Choice*

of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 96 Yale L.J. 1, 62 n.426 (1986). The MLP's application of West Virginia law without conducting a "significant contacts" analysis allowed it to determine asbestos liability issues for the entire country, thus thwarting the local policies of numerous states, in disregard of the federalism limitations imposed by the United States Constitution.

VI. The "Collateral Estoppel" Ruling Raises Constitutional Issues.

Respondents do not attempt to defend the trial court's clear violation of UCC's due process rights through its egregious collateral estoppel ruling. Instead, Respondents argue that the ruling only involves a state law question. Opp. at 27-28. To make such a claim, Respondents ignore the reasoning of this Court that it is a violation of due process to estop parties from presenting a defense when they have not had a full and fair opportunity to litigate the claim at issue. *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who . . . has never had an opportunity to be heard."). Again, UCC's rights were sacrificed on the altar of expediency. The deliberate intent cases were "resolved" through a clearly unconstitutional misapplication of the collateral estoppel doctrine, so that the court could clear its docket. Efficiency trumps fairness in West Virginia.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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